November 7, 2007

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of 07FISH Initiative Application
A.G. file no: 663-08-0032

Dear Lieutenant Governor Parnell:

I. INTRODUCTION

You have asked us to review an application for an initiative entitled "An Act to restore fisheries conservation and habitat protection functions to the Alaska Department of Fish and Game." The purpose of the initiative is to partially rescind Governor Murkowski's Executive Order No. 107, which took effect in 2003, the primary purpose of which was to transfer the functions of the Fisheries Habitat Division from the Department of Fish and Game to the Department of Natural Resources.[1]

We find no legal problems with the bill and so we recommend that you certify the application.

II. SUMMARY OF THE PROPOSED BILL

The bill is comprised of several sections. Section 1 sets forth the purpose, which is to restore the functions of the Fisheries Habitat Division to the Department of Fish and Game, or in other words, to partially rescind Executive Order 107.

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[1] Executive Order 107 made changes requiring the force of law to take effect. It was submitted to the legislature during the 2003 regular session in accordance with Article III, section 23 of the Alaska Constitution, and the legislature did not disapprove it.

Most sections of the bill directly rescind statutory amendments made in sections of Executive Order 107. The following chart identifies the sections of the bill that rescind or partially rescind sections of Executive Order 107:

07FISH Section	EO 107 Section	Affected Statute
2	2	AS 16.05.920(a)
3	3	AS 16.05.925(a)
5	4	AS 16.20.070
6	6	AS 41.17.010(7)
7	7	AS 41.17.041(e)
8[2]	8	AS 41.17.047(c)
9	9	AS 41.17.047(d)
10	18	AS 41.17.090(d)
11	19	AS 41.17.090(e)
12[3]	20	AS 41.17.098(a)
13	21	AS 41.17.098(b)
14	23	AS 41.17.098(d)
15	24	AS 41.17.098(e)
16	29	AS 41.17.118(c)
17	31	AS 41.17.120
18	35	AS 41.17.910(a)
19	36	AS 41.17.910(b)
20	37	AS 41.17.910(c)
21	38	AS 41.17.950(1)
22	41	AS 44.62.330(a)(48)
23	42	AS 46.15.020(b)
25	46	Uncodified Law

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[2] Section 8 of the bill contains what appears to be a drafting error. It reads: "The board, working with the department . . . ." Current statute, however, reads: "The board, working with the division . . . ." The sponsors probably intended this section to read: "The board working with the **department** [DIVISION] . . . ."

[3] Sections 12-18 of the bill only partially rescind the corresponding sections in Executive Order 107. The apparent reason for this is that the sponsors do not want to rescind those sections of Executive Order 107 that pertain to the transfer of functions to the State Forester. Sections 10-17, 22, 25-27, and 32 of Executive Order 107 transferred certain functions from the Commissioner of the Department of Natural Resources to the State Forester. The initiative bill does not rescind these sections. Sections 12-18 of the bill preserve the transfer of functions to the State Forester in the corresponding sections listed above in Executive Order 107.

Section 4 of the bill restores certain statutes (AS 16.05.840 --.900) to AS 16.05 that were repealed from AS 16.05 and re-enacted in AS 41.14 by sections 5 and 44 of Executive Order 107. Section 4 of the bill, however, does not restore all of the statutes enacted in AS 41.14 by section 5 of Executive Order 107. AS 41.14.150 --. 200 and AS 41.14.990, which were enacted by section 5 of Executive Order 107, are repealed by section 24 of the bill.

In addition to the repeal of statutes mentioned above, section 24 of the bill also repeals AS 41.17.905 (enacted by section 34 of Executive Order 107), AS 41.17.950(23) (enacted by section 39 of Executive Order 107), AS 44.37.055 and 44.37.060 (enacted by section 40 of Executive Order 107).

In summary, the substantive effect of the bill is to transfer the fish habitat functions from the Department of Natural Resources back to the Department of Fish and Game, while preserving Executive Order 107's transfer of functions to the State Forester.

III. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial" within 60 days of receipt. The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080. We discuss these next.

A. FORM OF THE PROPOSED BILL

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects – dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation – are listed in AS 15.45.010 and in article XI, section 7, of the Alaska Constitution.

The bill satisfies each of these four requirements. It is confined to one subject, the rescission of Executive Order 107. The subject of the bill is expressed in the title ("to restore fisheries conservation and habitat protection functions to the Alaska Department of Fish and Game"). The enacting clause is set out correctly. The bill does not contain any of the prohibited subjects.

We note, however, that the bill is somewhat unusual because it seeks to partially rescind an executive order. By way of background, the governor is constitutionally authorized to make organizational changes in the executive branch. Alaska Const. art. III, §23. Where such "changes require the force of law" they must be set forth in an executive order and submitted to the legislature for review. Changes requiring the force of law include changes to statutes. The legislature has 60 days of a regular session to disapprove of an executive order. *Id.* In this case, Executive Order 107 amended statutes relating to fisheries habitat functions, thus requiring the force of law to become effective. As noted above, Executive Order 107 was submitted to the legislature as required, but the legislature declined to disapprove it. Accordingly, we address whether the rescission of an executive order is an appropriate subject for the initiative.

The provisions of the Alaska Constitution that pertain to the legislative disapproval of executive orders are potentially applicable to rescission of an executive order by initiative. The Alaska Constitution provides that "[t]he legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove [] executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor." Alaska Const. art. III, §. 23. Further, the Alaska Constitution provides that whenever the Constitution uses the terms "by law, "by the legislature," or variations of these terms, they should be taken to mean "law-making powers" that may be exercised by the people through the initiative. Alaska Const. art. XII, sec. 11.

Construing these two constitutional provisions together, one might possibly conclude an initiative could disapprove of an executive order under article III, section 23 of the Alaska Constitution. We think, however, this would be incorrect. Article XII, section 11 of the Alaska Constitution provides that "[u]nless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI." We think that this is one of the situations in which the initiative power is "clearly inapplicable." The reason it is clearly inapplicable is that it would be essentially impossible for the people to act by initiative to disapprove an executive order within the 60-day time frame provided by the Alaska Constitution. [4]

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[4] In determining whether the initiative is clearly inapplicable to law-making powers, the Alaska Supreme Court has applied what it calls the "55 idiots" test—in other words, the initiative must be so clearly inapplicable to the law-making power that "even 55 idiots would agree that it was inapplicable." *Brooks v. Wright,* 971 P.2d 1025, 1028-29 (Alaska 1999) (quoting Delegate McLaughlin from the Alaska Constitutional

While the initiative power does not extend to disapprovals under article III, section 23, it does not follow that the initiative power cannot be used to rescind an executive order that has acquired the force of law. As we have stated previously, the purpose of giving the legislature 60 days to disapprove of executive orders is simply to give the legislature the chance to review such an executive order before it becomes law. 1977 Inf. Op. Att'y Gen. (March 29; 660-72-0011). It does, not, however, prohibit the legislature under its own legislative power from later rescinding or amending laws enacted by executive order. Rather, the Alaska Supreme Court has held that the legislature has its own independent power under article III, section 22 of the Alaska Constitution[5] to allocate functions amongst executive branch agencies. *Capital Information Group v. State*, 923 P.2d 29, 40 (Alaska 1996). Since "the law-making powers assigned to the legislature may be exercised by the people through the initiative" and there is no time restraint making the initiative clearly inapplicable to this situation, we conclude that the people may by initiative rescind or partially rescind an executive order that has acquired the force of law. Alaska Const. art XII, §11; Alaska Const. art. III, §22.

Therefore, this initiative measure is a proper subject for the initiative because it allocates functions among departments of the executive branch. We turn to the form of the application next.

Convention). We reserve judgment as to whether Delegate McLaughlin's self-deprecating and ironic comment on the floor of the convention should be transformed into a legal test, but agree with the Court that the Constitutional Convention's intention is certainly clear that the "clearly inapplicable" exception is quite narrow.

[5] "All executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments. . . ." Alaska Const. art. III, §22.

B. THE FORM OF THE APPLICATION

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application must include the
>
> (1) proposed bill;
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> (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and
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> (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

AS 15.45.030. The application meets the first and third requirements as well as the latter portion of the second requirement regarding the statement on the signature page. With respect to the first clause of the second requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

C. NUMBER OF QUALIFIED SPONSORS

The Division of Elections within your office will determine whether there are a sufficient number of qualified sponsors.

IV. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared the following ballot-ready petition summary and title for your consideration:

BILL RESTORING FISHERIES HABITAT FUNCTIONS TO THE ALASKA DEPARTMENT OF FISH AND GAME

This bill would transfer functions relating to fisheries habitat from the Department of Natural Resources to the Department of Fish and Game. This bill would not transfer any functions related to the State Forester. In so doing, this bill would partially rescind an executive order that took effect in 2003.

Should this initiative become law?

This summary has a Flesch test score of 47.7. We believe that the summary meets the readability standards of AS 15.60.005.

V. CONCLUSION

For the above reasons, we find that the proposed bill is in the proper form, and therefore recommend that you certify this initiative application.

Please contact me if we can be of further assistance to you on this matter.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:
Michael A. Barnhill
Senior Assistant Attorney General

MAB/ajh

cc: Whitney Brewster, Director of Division of Elections